

Sri Lanka, Australia and Asylum Seekers

Country Guidance Update July 2018

Prepared for the Blue Mountains Refugee Support Group, NSW Australia, July 2018

Introduction This update lists significant developments relevant to the situation of Sri Lankans seeking asylum in Australia, up to July 2018. For a comprehensive picture, it **must be read in conjunction with the BMRSG's country guidance paper on Sri Lanka, published in July 2013, and an update of October 2014.**

Related papers:

- SRI LANKA, AUSTRALIA AND ASYLUM SEEKERS – A country guidance paper for refugee supporters July 2013
- SRI LANKA, AUSTRALIA AND ASYLUM SEEKERS 2013-2014– A country guidance update for refugee supporters October 2014
- SRI LANKA, AUSTRALIA AND ASYLUM SEEKERS – Country Guidance Update September 2015

All of these papers are available on our website:

www.bsmrsg.org.au/research-material/sri-lanka

Summary

Since our last update in September 2015, despite a change of government in January 2015 under the new president, Maithripala Sirisena, the people of Sri Lanka are still struggling to rebuild the country's democratic institutions and obtain justice for the crimes committed during the civil war, which ended in 2009.

International human rights bodies, such as the UN Human Rights Council (on 21 March 2018) and Human Rights Watch (on 20 June 2018), have criticised Sri Lanka for its slow progress on human rights. Specifically, it has been slow in implementing the transitional justice mechanisms which were required by resolution 30/1 of the UN Human Rights Council passed in 2015, namely:

- a special court for alleged war crimes, with support from international practitioners;
- a reparations tribunal to provide victims and survivors potential restitution;
- an office for missing persons to investigate disappeared persons; and
- a truth and reconciliation office.

In addition, according to the UN Committee Against Torture (in November 2016) and Amnesty International (on 9 December 2016), Sri Lanka must take decisive action to stop torture and other ill-treatment, as torture by police remains a common practice.

The UN Special Rapporteur on Torture reporting on his mission to Sri Lanka in April/May 2016, (published in December 2016), noted that in the North and East, anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces. In addition, he found

prison conditions were inhumane, characterized by very deficient infrastructure and pronounced overcrowding.

The UN Special Rapporteur on countering terrorism, reporting on his mission to Sri Lanka in July 2017 (published in July 2018) said that reform had ground to a halt, and that individuals are still held in detention under the Prevention of Terrorism Act and are subject to routine and systemic torture. The Tamil community remains stigmatised and disenfranchised, while the trust of other minority communities is being steadily eroded.

As stated in BMRSG's September 2015 update, it is still unsafe for returnee asylum seekers returning to Sri Lanka. It is a criminal offence for them to have left Sri Lanka without permission, and they face arrest and prosecution on their return to Sri Lanka.

In addition, there have been ongoing incidents involving inter-communal violence, attacks and hate speech against minorities, including violence against Muslims in the Kandy district in March 2018 that led to the proclamation of a state of emergency for 12 days.

The conclusions drawn from evidence in BMRSG's earlier guidance paper and updates remain substantially unaffected. No assumptions can yet be made about major positive change in Sri Lanka that might affect returning asylum seekers.

Section 1: Political Developments in Sri Lanka

As stated in BMRSG's 2015 updates, President Maithripala Sirisena was elected President of Sri Lanka in January 2015, replacing President Mahinda Rajapaksa, who was president during the long civil war which ended in 2009. In subsequent parliamentary elections, United National Party (UNP) leader Ranil Wickremesinghe won parliamentary elections. The government of President Sirisena and Prime Minister Wickremesinghe remains in office as at July 2018.

The current position with respect to human rights is summarised in a report to the UN Human Rights Council by the Office of the High Commissioner on Human Rights (OHCHR), on 21 March 2018 as follows:

"We welcome the Government's constructive **engagement with OHCHR and the human rights mechanisms**, including its cooperation with visits of this Council's Special Rapporteurs on human rights and terrorism; on truth, justice, reparation and guarantees of non-recurrence; and the Working Group on Arbitrary Detention. We also welcome Sri Lanka's accession to the Optional Protocol to the Convention against Torture and the adoption of the National Human Rights Action Plan.

Yet, it is with much regret that we must report **slow progress in establishing transitional justice mechanisms**. In the absence of concrete results or publicly available drafts of legislation, it seems doubtful that the transitional justice agenda committed to by the Government under this Council's resolution 30/1 could be fully implemented before our next report in March 2019.

We further regret that the commissioners of the **Office of Missing Persons** were only recently appointed, 20 months after the adoption of the legislation.

In addition, there has been **insufficient progress in returning land** occupied by the military. Trust will not be rebuilt if land grabbing continues, nor without independent mechanisms established to determine fair compensations for land reserved for security reasons.

Furthermore, the Authorities have yet to demonstrate with the willingness or the capacity to **address impunity** for gross violations of international human rights and international humanitarian law. This strengthens the argument for the establishment of a specialized court to deal with serious crimes, supported by international practitioners. In the absence of such a mechanism, we call on Member States to exercise universal jurisdiction.

We are also seriously concerned about multiple incidents of **inter-communal violence, attacks and hate speech against minorities** observed last year – a worry further exacerbated by recent developments that have occurred since the drafting of the report, including violence against Muslims in Kandy district that led to the proclamation of state of emergency for 12 days. Allegations of continuing use of torture and continued reports of harassment or surveillance of human rights defenders are more than worrying.

In light of the gravity of the above matters and given the important role that this Council has played to date, the High Commissioner strongly advises that this Council continue to focus its attention on the human rights of the people of Sri Lanka and in particular on the processes in place for accountability and reconciliation.”

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22875&LangID=E>

In addition, testimony by John Sifton, of Human Rights Watch, on 20 June 2018 to the US House of Representatives Foreign Affairs Committee, Subcommittee on Africa, Global Health, Global Human Rights and International Organizations, confirms that slow progress has been made by the Sri Lankan Government on human rights:

“Since 2015, two separate resolutions at the UN Human Rights Council have passed by consensus with Sri Lanka’s consent, affirming a commitment by the government for four transitional justice mechanisms: a special court for alleged war crimes, a reparations tribunal to provide victims and survivors potential restitution, an office for missing persons to investigate disappeared persons, and a truth and reconciliation office.

As of 2018, the office of missing persons is the only entity of these four that the government has established. It has begun to hold hearings in various parts of the country. But work has been slow, and it has yet to issue any public reports, and many families of the disappeared remain in the dark about the fate of their family members.

For relatives of the disappeared, it has been too many long years of waiting. Some families have held outdoor vigils continuously for over a year seeking answers, despite declarations from the president and the prime minister that all the missing are dead. For our staff who visit these vigils, and who have worked to document abuses and disappearances, it is painful to observe the wives or parents living, eating, and sleeping outside, on thatch mattresses under small canopies, waiting for answers that aren’t coming. But, of course that is nothing compared to the pain of these families, deprived even of information about the fate of their loved ones.

On reparations, progress has similarly been slow. The cabinet recently adopted a bill to provide reparations to certain persons affected by the conflict, but many fear payments will later be used as a justification for not addressing other issues, from missing persons to the need for investigations of war crimes. As for truth and reconciliation legislation, it remains stalled.

Most detrimental for Sri Lanka's long-term stability, no real progress has been made on creating a special court to investigate and prosecute war crimes. Despite pledges by the government to undertake this key step, the president and prime minister have publicly stated that "war heroes" will not be tried for their abuses.

A court with participation by foreign judges and legal experts was specifically promised in the 2015 Human Rights Council resolution, so the lack of progress will only serve to disillusion victim families. Many victims and survivors have told Human Rights Watch that they won't accept reparations unless they start seeing real progress on justice and accountability. The debate over accountability is also likely to have political ramifications as the parties vie for popular support. Among those who may run in the next election is the former president's brother and former defense secretary, Gotabaya Rajapaksa, a dual US-Sri Lanka citizen, who has been implicated in military abuses at the end of the war.

Sri Lanka's human rights problems today extend beyond issues of justice and accountability. The draconian Prevention of Terrorism Act, which has long facilitated torture and other abuse, remains in effect. The government has also failed to initiate reforms to the security sector and criminal justice system, such as establishing accountability for police abuses or bringing criminal laws in line with international standards. Muslims and other religious minorities face ongoing threats and violence from ultra-nationalist Buddhist groups."

<https://www.hrw.org/news/2018/06/20/testimony-john-sifton-human-rights-concerns-sri-lanka-house-foreign-affairs>

In July 2017, the UN Rapporteur on countering terrorism, Ben Emmerson QC visited Sri Lanka and in July 2018, published a report on Sri Lanka. He concluded that:

"In 2015, Sri Lanka seemed to have turned a corner. New elections brought to power a coalition government and with it the promise of change. Human Rights Council resolution 30/1, co-sponsored by Sri Lanka itself, set out key goals for reconciliation, transitional justice, accountability and reform of the security sector, including the counter-terrorism framework. Yet, after a two-year extension granted to the Government in resolution 34/1, progress in achieving the key goals seems to have ground to a virtual halt. None of the measures so far adopted to fulfil Sri Lanka's transitional justice commitments are adequate to ensure real progress.

The counter-terrorism apparatus is still tainted by the serious pattern of human rights violations that were systematically perpetrated under its authority. At the time of writing, the Prevention of Terrorism Act (PTA) remained on the statute book. The new draft Framework largely reflects the interests of the security sector and is far from being adequately grounded in international human rights law. Individuals are still held in detention under the PTA, impunity is still the rule for those responsible for the routine and systemic use of torture, and countless individuals are the victims of gross miscarriages of justice resulting from the operation of the PTA. The Tamil community remains stigmatised and disenfranchised, while the trust of other minority communities is being steadily eroded."

https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF

The UN Committee against Torture considered a report on Sri Lanka in November 2016 and noted allegations of routine torture during police detention:

“The Committee remains seriously concerned at consistent reports from national and United Nations sources, including the Special Rapporteur on torture, indicating that torture is a common practice carried out in relation to regular criminal investigations in a large majority of cases by the Criminal Investigation Department of the police, regardless of the nature of the suspected offence. The Committee is concerned that the broad police powers to arrest suspects without a court warrant has led to the practice of detaining persons while conducting the investigations as a means to obtain information under duress. The Committee notes allegations that police investigators often fail to register detainees during the initial hours of deprivation of liberty or to bring them before a magistrate within the time limit prescribed by law, during which time torture is particularly likely to occur. It also notes with concern that neither the Attorney General nor the judiciary exert sufficient supervision over the legality of the detention or the conduct of police investigations to prevent this practice. In this regard, the Committee shares the concern of the Special Rapporteur on torture that magistrates often do not inquire into potential ill-treatment during pretrial hearings and agree to the requests of police officers to keep suspects in remand custody without further scrutiny.”

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/020/09/PDF/G1702009.pdf?OpenElement>

Similarly, Amnesty International has criticised the government’s lack of progress on prevention of torture and other ill-treatment, in a report on 9 December 2016:

“In its assessment of Sri Lanka’s record on torture and other ill-treatment, the UN Committee against Torture said that the 26-year-long internal armed conflict continues to cast a long shadow over the country.

Despite promises, the authorities have failed to investigate serious human rights violations committed during the armed conflict.

Violations, however, were not limited to the legacy of the past. The Committee expressed concerns – shared by Amnesty International – that torture by police remains “a common practice,” with the absence of crucial safeguards in detention facilitating such abuse.

Amnesty International joins the UN Committee against Torture in calling on the Sri Lankan authorities to identify and prosecute perpetrators of unlawful killings, including of five Tamil students on Trincomalee beach and of 17 aid workers in the town of Muttur in 2006. We support the call of the Committee for Sri Lankan authorities to protect the family of disappeared political cartoonist Prageeth Eknaligoda from harassment or reprisal as they seek truth and justice.

“The Sri Lankan government has previously made a commitment to address the widespread human rights violations that occurred during Sri Lanka’s armed conflict and in its immediate aftermath. But it has yet to lend those words substance by establishing the promised institutions, such as a judicial mechanism with a Special Counsel, a commission for truth, justice, reconciliation and non-Recurrence, and an office for reparations,” said Champa Patel.

Important but limited progress

Amnesty International is encouraged by some of the important steps Sri Lanka has taken, including the introduction of legislative and other measures designed to prevent torture and other ill-treatment. However, these efforts have yet to be implemented effectively, leaving impunity for perpetrators in place.

The Sri Lankan authorities have also failed to act on previous observations made by the Committee against Torture. Safeguards are yet to be introduced to prevent torture and other ill-treatment by the security forces, and despite prohibitions in Sri Lanka's Evidence Ordinance, courts continue to admit "confessions" obtained through torture and other ill-treatment into evidence.

The Committee expressed alarm that an official with previous command responsibility over a notorious site of torture and other ill-treatment was part of a delegation to meet with UN officials in Geneva."

<https://www.amnesty.org.au/sri-lanka-much-remains-to-be-done-on-torture/>

In March 2018, the Sri Lankan government declared a state of emergency for 12 days to counter communal rioting and attacks on Muslims in the Kandy district. Two people were killed and hundreds of Muslim-owned properties and more than 20 mosques were damaged, media reported. SBS News reported that:

"A police spokesman said hundreds of commandos from the police Special Task Force had been deployed to the troubled district to restore order and enforce the curfew.

Muslim homes, business and mosques were badly damaged in riots Monday triggered by the death of a Sinhalese man at the hands of a mob last week."

According to a Guardian Australia report, the anti-Muslim violence was fomented by posts on Facebook.

<https://www.sbs.com.au/news/sri-lanka-declares-emergency-to-quell-anti-muslim-riots>

<https://www.sbs.com.au/news/calm-returns-to-mob-hit-sri-lankan-towns>

<https://www.sbs.com.au/news/sri-lanka-lifts-state-of-emergency>

https://www.theguardian.com/commentisfree/2018/may/05/facebook-anti-muslim-violence-sri-lanka?CMP=Share_iOSApp_Other

Section 2: The Issue of Returning Asylum Seekers

The Australian Government is continuing to return Tamil asylum seekers to Sri Lanka despite international concern as to their safety. Recently some cases have made the news such as Thileepan, who arrived in Australia in June 2012, after fleeing Sri Lanka. In July Safe Haven Enterprise Visas (SHEV) were granted to his wife and child but he along with 10 other Tamils were deported on a specially chartered plane. He was arrested upon arrival but later released.

<https://www.theguardian.com/australia-news/2018/jul/16/australia-to-deport-tamil-asylum-seeker-and-separate-him-from-baby-daughter>

Then on 27 July 2018, The Guardian Australia reported that [Australia has deported a Tamil asylum seeker despite his father's murder](#).

In the Conversation dated 2 August 2018, the writer stated that [Sri Lankan asylum seekers are being deported from Australia despite fears of torture](#), saying it is time for Australia to start listening to the

fears of those seeking asylum rather than continuing to accept the very different information provided by the Sri Lankan government.

As stated in the September 2015 update, it is an offence under the Immigrants & Emigrants Act for a person to leave Sri Lanka without approval. Returnees are routinely arrested at the airport, and are bailed after a period of time, as happened in July 2018 to a Tamil person who was deported from Australia.

<https://www.sbs.com.au/news/refugee-deported-from-australia-released-after-sri-lanka-arrest?cid=newsapp:socialshare:other>

In March 2018, the Guardian Australia reported that an asylum seeker who was deported to Sri Lanka was detained on arrival at the airport and was questioned for 4 hours prior to being released, but was subsequently twice visited by state security officers who interrogated him about his family and where his children attended school etc.

<https://www.theguardian.com/world/2018/mar/01/tamil-asylum-seeker-deported-by-australia-harassed-by-sri-lankan-security-forces>

The UN Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment reporting on his mission to Sri Lanka in April/May 2016, commented on surveillance and intimidation in the North and East as follows:

“Owing to the heavy militarization that still exists in the North and East of the country, surveillance continues to be used as a tool of control and intimidation. In addition to rehabilitated persons, many former detainees under the Prevention of Terrorism Act and their families, anyone deemed to have had any link to LTTE during the conflict and political and human rights activists remain subject to extensive surveillance and intimidation by the military, intelligence and police forces. While the extent and level of this practice have dropped compared to the early post-conflict period, systematic surveillance and intimidation continues, sometimes constituting ill-treatment.” (para 42)

The UN Special Rapporteur also commented on prison conditions:

“Although the Special Rapporteur did not receive any reports of ill-treatment by corrections staff, he found prison conditions to be inhumane, characterized by very deficient infrastructure and pronounced overcrowding. There was an acute lack of adequate sleeping accommodation, extreme heat and insufficient ventilation. Overpopulation also results in limited access to medical treatment, recreational activities and educational opportunities. These conditions combined constitute in themselves a form of cruel, inhuman and degrading treatment.” (para 53)

<https://www.ohchr.org/EN/countries/AsiaRegion/Pages/LKIndex.aspx>

Section 3: Key Developments in Australia

In 2017, both the Australian & Sri Lankan governments marked the 70th anniversary of diplomatic relations by signing a Joint Declaration of Enhanced Cooperation, under which they agreed to maintain their efforts to prevent people smuggling and “to ensure a close working relationship with relevant agencies”

Also in May 2017, Prime Minister Wickremesinghe made an official visit to Australia. In a joint press conference with Prime Minister Turnbull, Mr Wickremesinghe was asked about asylum seekers and stated that:

“Well, they left Sri Lanka illegally. They are welcome to return to Sri Lanka and we won't prosecute them. So they can come back to Sri Lanka and we will have them. But remember, they broke the law in coming to Australia, attempting to come to Australia.”

When asked whether it was safe to return to Sri Lanka, he replied:

“Yes, yes, it is quite safe in Sri Lanka. We just started a Missing Persons Office. It is quite safe to come back. Some of them have gone from areas in which the conflict never took place. All of them are not even Tamils and even the TNA want all the Tamils to come back. We should not make a mess of ourselves like they've gone and done in Europe and the Middle East.”

<https://www.pm.gov.au/media/press-conference-honourable-ranil-wickremesinghe-prime-minister-democratic-socialist-republic>

According to SBS News, human rights and refugee advocates responded with scepticism:

“Aran Mylvaganam, of the Tamil Refugee Council, works closely with asylum seekers who have been granted temporary settlement in Melbourne as they wait for their refugee claims to be processed.

"It is definitely not safe for Tamils to go back," he said.

"Just three weeks ago, the United Nations Special Rapporteur on Torture claimed that torture is still being used in Sri Lanka."

<https://www.sbs.com.au/news/definitely-not-safe-tamil-asylum-seekers-still-risk-torture-on-return-to-sri-lanka>

In a return visit by Prime Minister Turnbull to Sri Lanka in November 2017, he announced that three Australian Stabicraft vessels will be given to the Sri Lankan Coast Guard to boost maritime security, as well as assistance from the Australian Federal Police to reinforce Sri Lanka's counter-narcotics efforts. According to a press release by Prime Minister Turnbull, “this builds on the strong existing cooperation between Australia and Sri Lanka in addressing transnational crime, and people smuggling.”

<https://www.pm.gov.au/media/australian-prime-minister-malcolm-turnbull-visits-sri-lanka>

In September 2017, the High Court dismissed appeals by Sri Lankan asylum seekers, who were refused protection visas by the Australian Refugee Review Tribunal (SZTAL v Minister for Immigration & Border Protection).

The asylum seekers argued that by being deported to Sri Lanka, they would suffer “serious harm”, as defined in s 36 of the Migration Act, due to “intentionally inflicted” cruel or inhuman treatment, because they would be imprisoned on their return.

The High Court judgement was summarised on its website as follows:

“The Tribunal found that the appellants would likely be held in remand for a short period if they were returned to Sri Lanka and accepted that prison conditions in Sri Lanka were such that the appellants may be subjected to pain or suffering, or humiliation. However, the

Tribunal concluded that there was no intention to inflict pain or suffering, or to cause extreme humiliation. Country information indicated that the conditions in prisons in Sri Lanka were the result of a lack of resources, which the Sri Lankan government acknowledged and was taking steps to improve....

By grant of special leave, the appellants appealed to the High Court. The High Court dismissed the appeal. A majority of the Court held that the expressions "intentionally inflicted" and "intended to cause" require actual subjective intention to bring about pain or suffering or humiliation. The majority rejected the appellants' contention that the element of intention was satisfied where a person did an act knowing that the act would, in the ordinary course of events, inflict pain or suffering or cause extreme humiliation."

<http://www.hcourt.gov.au/publications/judgment-summaries/2017-judgment-summaries>

In December 2017, a group of 29 Sri Lankan asylum seekers were reportedly detected in a boat off Western Australia near the Cocos Islands and were arrested by Australian Border Protection officials and flown home to Sri Lanka. The Australian government declined to comment on operational matters.

<https://www.sbs.com.au/news/sri-lankan-asylum-seekers-returned>

In July 2018, a Tamil asylum seeker was deported to Sri Lanka despite a last-minute plea to re-examine his case, after his father was shot dead in Sri Lanka, and his mother and sister disappeared earlier this year. The asylum seeker believed that the state security forces killed his father, because they suspected that they had supported the LTTE (Tamil Tigers).

https://www.theguardian.com/australia-news/2018/jul/27/australia-deports-tamil-asylum-seeker-despite-fathers?CMP=Share_iOSApp_Other

Conclusion

International human rights bodies have criticised the Sri Lankan government for slow progress on human rights and currently reform has ground to a halt.

In July 2018, the UN Special Rapporteur on countering terrorism reported that individuals are still held in detention under the Prevention of Terrorism Act (PTA), impunity is still the rule for those responsible for the routine and systemic use of torture, and countless individuals are the victims of gross miscarriages of justice resulting from the operation of the PTA. The Tamil community remains stigmatised and disenfranchised, while the trust of other minority communities is being steadily eroded.

Asylum seekers returning to Sri Lanka are subject to routine arrest and prosecution and face continuing police harassment. It would appear therefore that it is still unsafe for them to return to Sri Lanka.